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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 577

JACK TRIMBLE AND JOE TRIMBLE, BY HIS NEXT FRIEND, JACK TRIMBLE,

Appellants,

vs.

ZACH JUSTICE AND K. L. ARNOLD, EXECUTORS AND TRUSTEES, ET AL.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

APPELLEES' STATEMENT AGAINST THE JURISDICTION OF THIS COURT AND MOTION TO DISMISS AND/OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

LEWRIGHT BROWNING,
J. J. MOORE,
Counsel for Appellees.

INDEX.

Motion to Dismiss the Appeal.

Authorities Cited in Support of Motion.

	Page
Citizens' National Bank v. *Durr*, 257 U. S. 99; 66 Law Ed. 149; 42 Sup. Ct. Rep. 15	4
Honeyman v. *Hanan*, 57 Sup. Ct. 350, 300 U. S. 14; 81 L. Ed. 476	4
Louisville & Nashville Railroad Co. v. *Woodford*, 234 U. S. 46; 58 Law Ed. 1202	2
Louisville & Nashville Railroad Co. v. *Woodford*, 152 Ky. 421; 153 S. W. 722	3

Motion to Affirm the Judgment.

Authorities Cited in Support of Motion.

Bingham's Admr. v. *Commonwealth*, 196 Ky. 318; 244 S. W. 781	10
33 C. J., page 315, Section 108	11
Edwards v. *Slocum*, 287 F. page 653, 264 U. S. 61, 68 L. Ed. 564	8
Erie R. Co. v. *Tomkins*, 304 U. S. 64, 82 L. Ed. 1195	10
Hampton's Admr. v. *Hampton*, 188 Ky. 199; 221 S. W. 496	9
In Re Oakes, 248 N. Y. 280; 162 N. E. 79	8
Martin, et al, v. *Martin's Admr., et al*, 283 Ky. 513; 142 S. W. (2) 164	9
Newton's Estate, 28 Pa. Dist. 183	11
Riggs v. *Del Drago*, — U. S. —, 87 Law Ed. 69 (Advance Sheets)	6
Section 811 and 811 (c) I. R. C. (26 U. S. C. A. 811 and 811 (c))	11
Thompson v. *Union Mercantile Trust Co.*, 164 Ark. 411; 262 S. W. 324	10

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APPELLEES' STATEMENT AGAINST THE JURISDICTION OF THIS COURT AND MOTION TO DISMISS AND/OR AFFIRM THE JUDGMENT OF THE COURT OF APPEALS OF KENTUCKY AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

Appellees move to dismiss the appeal herein and assign the following grounds:

This is an appeal from a judgment of the Court of Appeals of Kentucky. The opinion was handed down on June 25, 1943, and is referred to in Appellants' statement as "Exhibit B".

Appellants have not and cannot comply with Rule 12 of this Court by filing a jurisdictional statement showing that any Federal question, either Constitutional or Statutory,

was called in question or decided by the Kentucky Court. No such questions were raised, either in the court of first instance (Pike Circuit, Kentucky) or Kentucky Court of Appeals.

Hence, as no Federal questions were presented or passed upon by the State Courts, this Court is without jurisdiction to entertain the appeal. The only reference in Appellants' answer, filed in the Pike Circuit Court, with reference to any Federal Statute is as follows:

> "Defendant says that all estate taxes assessed by the United States of America against the estate of James Hatcher, deceased, which assessment includes all property given or conveyed by James Hatcher within two years before his death, should be paid by the executors of said James Hatcher, deceased, from the assets of the estate, as provided by Federal Statute, Internal Revenue Code as amended; that all the estate tax assessed by the United States of America is a debt of the decedent."

The above language is not sufficient to raise any Federal question, either Constitutional or Statutory, or to assert any rights under either. The statement is an erroneous conclusion of the pleader. If he had said the estate taxes should be paid out of said estate, as provided by the Laws of Kentucky, we think it would have been correct as we shall presently point out. However, the court of first instance and the Court of Appeals of Kentucky could not pass upon any Federal question, because no such question was raised.

In *Louisville and Nashville Railroad Company* v. *Woodford*, 234 U. S. 46, 58 Law Ed. 1202, it was held that in order to give this Court jurisdiction, it must appear of record that a Federal question was specifically set up and claimed in the State Court at the proper time and in the proper way, and that the State Court passed upon the question

presented for decision and that its decision was against Appellant.

This Court said:

> "The decisions of this court not only have repeatedly held that a Federal right, in order to be reviewable here, must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question, because it was not raised in the trial court, as required by the state practice. Schuyler Nat. Bank *v.* Bollong, 150 U. S. 85, 37 L. Ed. 1008, 14 Sup. Ct. Rep. 24; Erie R. Co. *v.* Purdy, 185 U. S. 148, 46 L. Ed. 847, 22 Sup. Ct. Rep. 605; Layton *v.* Missouri, 187 U. S. 356, 47 L. Ed. 214, 23 Sup. Ct. Rep. 137. In this case there is no reason to believe that there was an attempt on the part of the state court to evade the decision of Federal questions, duly set up, by unwarranted resort to alleged rules under local practice, and upon this (52) point this case comes within former rulings of this court, as we have seen."
>
> "As to the contention that the case really raised a Federal question because it involved the constitutional validity of a state statute when opposed to the exclusive rights secured under a Federal law,—an examination of the record shows that no such question was made in the state court, nor was it necessarily involved in the decision made, in such sense as to make the case reviewable here on that ground."
>
> "It follows that the case must be dismissed for want of jurisdiction."

As pointed out in *Louisville and Nashville Railroad Company* v. *Woodford, supra,* the Court of Appeals of Kentucky said in same case (152 Ky. 421, 153 S. W. 722) that:

> "The office of the pleadings is to make plain the issues between the parties, and upon the issues thus

raised the parties are entitled to have the case tried."

"Bearing in mind these elementary rules of pleadings and practice, and turning first to the pleadings, we find no federal question suggested anywhere."

"In view of the fact that the question had been nowhere raised by the pleadings, instruction, or motion for a new trial, or by a motion of any kind, we must conclude that it was raised orally, and was discussed as an academic question. But, under Section 115 of the Civil Code of Practice, pleadings are required to be in writing; by subsection 5 of section 317 instructions must be in writing; and under subsection 1 of section 624, even notices are required to be written. A mere oral request of the trial court to instruct upon any given question brings no question before this court for review. Bell *v.* Louisville Railway Co., 148 Ky. 189, 146 S. W. 383."

In *Honeyman* v. *Hanan*, 57 S. Ct. 350, 300 U. S. 14, 81 L. Ed. 476, this Court said:

"We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. Commercial Nat. Bank *v.* Buckingham, 5 How. 341, 12 L. Ed. 180; Lawler *v.* Walker, 14 How. 154, 14 L. Ed. 366; Mississippi & M. R. Co. *v.* Rock, 4 Wall. 180, 18 L. Ed. 382; Parmelee *v.* Lawrence, 11 Wall. 38, 20 L. Ed. 49."

In *Citizens' National Bank* v. *Durr*, 257 U. S. 99, 66 Law Ed. 149, 42 Sup. Ct. Rep. 15, a question similar to the one here presented was before this Court and the Court said:

"A suit for injunction brought in a state court by Anderson against Durr, then auditor, and Cooper, then treasurer, of Hamilton County, Ohio, raised the ques-

tion whether a certain property tax imposed under authority of the State of Ohio upon plaintiff, a resident of that State, by reason of his owning a membership—figuratively termed a 'seat'—in the New York Stock Exchange, infringed his rights under the commerce clause of the Constitution of the United States, on the 'due process of law' or 'equal protection' provisions of the 14th Amendment. His assault upon the tax was sustained by the court of first instance (20 Ohio N. P. N. S. 538), but overruled by the Court of Appeals (29 Ohio C. A. 465), and finally by the Supreme Court of the State (100 Ohio St. 251, 17 A. L. R. 82, 126 N. E. 57). Until the decision of the latter court the Federal right had been asserted merely as a claim of immunity from the tax under the constitutional provisions referred to, without drawing in question the validity of any statute of, or authority exercised under, the State, on the ground of their being repugnant to those provisions. After the final decision, in an application to the Supreme Court for a rehearing, plaintiff for the first time asserted that the decision, if adhered to, rendered the Ohio taxation statutes invalid because of such repugnance. This application was denied without reasons given, and hence must be regarded as having come too late to raise any question for review by this Court. Citing Loeber *v.* Schroeder, 149 U. S. 580, 585, 37 L. Ed. 856, 859, 13 Sup. Ct. Rep. 934; Fullerton *v.* Texas, 196 U. S. 192, 193, 49 L. Ed. 443, 444, 25 Sup. Ct. Rep. 221; Corkran Oil Development Co. *v.* Arnaudet, 199 U. S. 182, 193, 50 L. Ed. 143, 150, 26 Sup. Ct. Rep. 41."

In the instant case, as stated, the Appellants never made any claim in the State Courts that to require them to pay the estate tax would deprive them of any of their rights under the Fourteenth Amendment, or would deny them any right under the Internal Revenue Act.

It is true that some contention was made with respect to this in Appellants' petition for rehearing in the Kentucky

Court of Appeals, but this petition was overruled without giving any reasons.

We submit therefore the appeal should be dismissed for lack of jurisdiction.

The Questions Presented Have Been Decided by This Court. Motion to Affirm the Judgment Appealed From and Deny Petition for Writ of Certiorari.

Appellees move to affirm the judgment appealed from and deny the petition for Writ of Certiorari.

The testator made certain gifts and transfers of property within two years of his death, and it was held by the Federal Revenue Department that same were made in contemplation of death; that they were testamentary in character and should be and were included in the gross estate, pursuant to Sections 811 and 811 (c), I. R. C. (26 U. S. C. A. 811 and 811(c)), and the tax was levied accordingly.

The Pike Circuit Court and the Court of Appeals of Kentucky held that the recipients of the gifts should bear their proportionate part of the Estate Tax; that if and when the Executor paid the tax he was entitled to contribution from the recipients of the gifts.

It is said in Appellants' Assignment of Errors that:

> "Congress by passing the Act of February 10, 1939, c. 2, 53 Stat. 1, as amended, Sections 826 (c) and 826 (d) I. R. C., designated what classes of property not passing through the hands of the Executor should contribute to the payment of the Federal Estate taxes, thereby excluding the right of any State to invade this field and impose upon any other class of property not passing through the hands of the executor the obligation to pay any part of the Federal Estate tax."

Similar contention was made in the recent case of *Riggs* v. *Del Drago* (Advance Sheets 87, Law Ed. 69). It appears

that the Legislature of New York in 1930 amended its decedent estate tax law in relation to Federal and Estate Taxes and Section 124 was challenged. This Court said:

"The question for decision is whether Sec. 124 of the New York Decedent Estate Law, which provides in effect that except as otherwise directed by the decedent's will, the burden of any federal death taxes paid by the executor or administrator shall be spread proportionately among the distributees or beneficiaries of the estate, is unconstitutional because in conflict with the federal estate tax law, Internal Revenue Code, Sec. 800 et seq., 26 USCA 1940 et seq. 800 et seq." • • •

"We are of opinion that Congress intended that the federal estate tax should be *paid out of the estate as a whole* and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax; accordingly, Sec. 124 is not in conflict with the federal estate tax law. This conclusion is based upon the provisions of the Revenue Act of (September 8) 1916, 39 Stat. at L. 756, Chap. 463, and subsequent acts, their legislative history and their administrative interpretation." • • • (Italics ours)

"In the Act of 1916 Congress turned from the previous century's inheritance tax upon the receipt of property by survivors (see Knowlton *v.* Moore, 178 US 41, 44 L ed 969, 20 S Ct. 646; Scholey *v.* Rew, 23 Wall. (U S) 331, 23 L ed 99) to an estate tax upon the transmission of a statutory 'net estate' by a decedent. That act directed payment by the executor in the first instance, Sec. 207, but provided also for payment in the event that he failed to pay, Sec. 208. *It did not undertake in any manner to specify who was to bear the burden of the tax.* Its legislative history indicates clearly that Congress did not contemplate that the Government would be interested in the distribution of the estate after the tax was paid, *and that Congress intended that state law should determine the ultimate thrust of the tax.*" (Italics ours)

See remarks of Congressman Cordell Hull and Congressman Kitchen in footnotes of above opinions in 1916 Acts, before the Ways and Means Committee, and the Committee reports accepting the 1932 Act recognizing that local law determines the ultimate incidence of the Federal Estate Tax.

> "Respondents also rely on Sec. 826 (c), authorizing the executor to collect the proportionate share of the tax from the beneficiary of life insurance includable in the gross estate by reason of Sec. 811 (g), and Sec. 826 (d), 26 USCA 1940 ed Sec. 811 (g), 826 (d), authorizing similar action against a person receiving property subject to a power which is taxable under Sec. 811 (f), as forbidding further apportionment by force of state law against other distributees. But these sections deal with property which does not pass through the executor's hands and the Congressional direction with regard to such property is wholly compatible with the *intent to leave the determination of the burden of the estate tax to state law* as to properties actually handled as part of the estate by the executor." (Italics ours)

In *Edwards* v. *Slocum*, 287 F. at page 653, it is said:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter."

The above opinion was affirmed in 264 U. S. 61, 68 L. Ed. 564, and it was recognized that "the distribution of the burden of taxation among the several beneficiaries is a matter of state regulation."

As said by Chief Justice Cardozo, In Re Oakes 248 N. Y. 280; 162 N. E. 79:

> "Gifts in contemplation of death or to take effect upon death, though made by separate instruments, are for that purpose to be consolidated with those passing

under the will, and the tax payable by the executor is to be computed according to the net value of the aggregate. Farmers' Loan & Trust Co. *v.* Winthrop, 238 N. Y. 488, 144 N. E. 769; Y. M. C. A. *v.* Davis, 264 U. S. 47, 44 S. Ct. 291, 68 L. Ed. 558."

If the States were limited in their right to say where the burden shall be, to only such property as may come into the hands of the personal representative, it would in effect make it impossible for the States in many cases to determine the ultimate impact of the burden, because many estates consist principally of real estate which never comes into or passes through the hands of the Executor or personal representative. To hold as contended by Appellants would destroy the Congressional intent and would in effect reverse the opinions cited and many others.

It is true Kentucky has no Legislative enactment on this question, but the Kentucky Court of Appeals has decided in three cases, as well as the instant case, that where there is no will providing otherwise, all the beneficiaries "shall bear their just proportion of the burden."

In *Hampton's Admr.* v. *Hampton,* 188 Ky. 199; 221 S. W. 496, the Court said:

> "Considering the act as a whole (Secs. 800 et seq. 26 U. S. Ca.) and particularly the provisions with respect to reimbursement and contribution, we cannot escape the conclusion that Congress did not intend to discriminate between the heirs and distributees, but intended that every portion of the estate should bear its proportionate part of the tax, subject, however, to the right of the decedent to provide by will out of what portion of his estate the tax should be paid."

In *Martin, et al.,* v. *Martin's Admr., et al.,* 283 Ky. 513; 142 S. W. (2) 164, the Court said:

> "However, since no such requirement is made in the federal statute (supra) levying the tax, and since it

would, as held in the Hampton opinion, be unjust and inequitable, *we conclude that in the absence of specific direction to the contrary justice requires that all classes of beneficiaries participating in the net value of the estate left after the federal tax is satisfied and deducted should, as between themselves, bear their just proportion of it.*" (Italics ours.)

In *Bingham's Admr.* v. *Commonwealth*, 196 Ky. 318; 244 S. W. 781, the Court said:

> "That Act contemplates its payment (Federal Estate Tax) upon final distribution out of the *entire estate* and by each distributee proportionately, unless otherwise provided by the decedent." (Italics ours.)

The foregoing opinions being from the highest Court are the law of Kentucky, as much so as if the principles announced were embodied in a Statute.

This was decided in *Erie R. Co.* v. *Tomkins*, 304 U. S. 64, 82 L. Ed. 1195, wherein this Court overruled previous decisions and adopted the language of Mr. Justice Holmes in one of his dissents and said:

> "But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else • • • the authority and only authority is the State, and if that be so, the voice adopted by the State as its own (*whether it be of its Legislature or of its Supreme Court*) should utter the last word." (Italics ours.)

Kentucky does not stand alone in adopting this just and equitable rule. See:

Thompson v. *Union Mercantile Trust Company*, 164 Ark. 411; 262 S. W. 324; 37 A. L. R. 536.

Newton's Estate, 28 Pa. Dist. 183.
33 C. J., page 315, Section 108.

It is true that some States, in the absence of a Statute, have decided that this tax must be paid out of the personalty or residue, but as pointed out in *Riggs* v. *Del Drago,* supra, there is nothing in Section 826 (b) U. S. C. A. commanding this.

It is true the Federal Act provides that the Executor shall pay the tax, but this does not change the rights of the beneficiaries, as pointed out in *Martin* v. *Martin's Admr., supra,* wherein the Kentucky Court said:

> "We do not regard as controlling the fact that the primary duty of paying the tax is imposed upon the executor, in view of the fact that the executor may be 'any person who takes possession of any property of the decedent,' and the further consideration that the obligation of the personal representative to pay the tax is a mere rule of administration to insure its payment, and does not in any way effect the rights of the heirs and distributees as among themselves."

The Court said further:

> "The personal representative who has paid, or is to pay the tax of the trust estate, should have the right of subrogation to the position of the sovereign which has received its tax, and to collect from those against whom the tax might have been, under certain circumstances, enforced under the provisions of the federal law had not the tax been promptly paid, or later paid as a debt against the residue."

The Federal Act makes no distinction between property which a person dies the owner of, or transferred in contemplation of death, or which passes through the hands of the Executor. The Estate Tax attaches to all of it.

The Congress has provided by Section 811 and 811 (c) I. R. C. (26 U. S. C. A. 811 and 811 (c)) "that the gross

estate of the decedent shall be determined by including all property * * * including 'transfers' * * * made by decedent within two years prior to his death."

This Court has declared that it is a matter for the States, through its Courts, to determine who shall bear the impact of the burden; that the United States is only interested in collecting the amount due. Hence, the contention made by Appellants is in conflict with the opinions of this Court cited supra.

We therefore submit that the appeal should be dismissed, or the judgment appealed from affirmed.

Respectfully submitted,

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Dated at Ashland, Kentucky, this 14th day of January, 1944.